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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 372

THAYER COMPANY, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. 34-51) is reported at 213 F. 2d 748. The findings of fact, conclusions of law and order of the Board (R. 2562-2585, 2350-2561)[1] are reported at 99 NLRB 1122.

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[1] "R" references are to the portion of the record printed in the four volume Joint Record Appendix. References to the original typewritten transcript of the testimony are denoted "Tr."

JURISDICTION

The decree of the court below was entered on July 1, 1954 (R. 2912). The petition for a writ of certiorari was filed on September 28, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1), and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. In the course of a lawful strike caused by the employer's unfair labor practices, some strikers engaged in conduct which restrained and coerced non-striking employees, and were thereafter refused reinstatement by the employer. The first question presented is whether, as a result of such misconduct, the strikers automatically forfeited their right to reinstatement, or whether on remand of the case to the Board, it is open to the Board to determine that their discharge was not "for cause" and that their reinstatement with back pay would effectuate the policies of the Act.

2. Whether the finding of a state court that picketing was carried on in a violent and coercive manner, and thus warranted the issuance of an injunction by that court, precludes the Board, in determining whether such picketing should result in a forfeiture of reinstatement rights under the Act, from making a *de novo* and contrary evaluation of the picketing.

3. Whether the Board properly concluded that the picketing in large numbers which occurred here was within the area of activity protected by

Section 7 of the Act, and thus did not afford the employer a valid excuse for denying the participants therein reinstatement.

4. Whether, in the light of petitioners' failure to lay any foundation for their production, the Board properly denied petitioners' request for statements which Board witnesses gave to Board representatives prior to the hearing, but which were not used at the hearing itself.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are set forth at pp. 29-32 of the Petition, and in the Appendix to this brief, pp. 29-36, *infra.*

STATEMENT

I. The Board's Findings of Fact

A. *The unfair labor practices leading to the strike and picketing.*

The Board found that, beginning in October 1948, petitioners embarked on an extensive program of unfair labor practices in an effort to undermine the organizational drive of the United Furniture Workers of America, Local 154, CIO (hereinafter called the Union). They engaged in numerous actions which restrained and coerced their employees in the exercise of rights guaranteed in Section 7 of the Act, thereby violating Section 8(a)(1); dominated and assisted a company union in each of their two plants, thereby violating Section 8 (a)

(2); and then discharged 17 employees active on behalf of the Union, in violation of Section 8 (a) (3). (R. 2566-2571, 2358-2450.) In protest over these unlawful discharges, petitioners' employees, on January 26 and 27, 1949, went out on strike (R. 2571, 2450-2454). The strike was accompanied by picketing at both of petitioners' plants, which lasted until March 15, 1949, when it was stopped pursuant to an injunction obtained by petitioners from the Superior Court for Worcester County, Massachusetts (R. 2462-2463). Petitioners thereupon refused to reinstate 103 of the strikers on the grounds, *inter alia,* that they had forfeited their right to reinstatement by engaging in "mass picketing" and other acts of misconduct (R. 2469, 2489). The substantive issues raised by the instant petition are concerned with the Board's rejection of these defenses.

B. *The conduct of the picketing*

The number of pickets was greatest at times when employees normally came to or left the plant, varying at such times from 25 to 60 at Plant 2 and from 20 to 160 at Plant 1.[2] However, before the picketing commenced, and at frequent intervals thereaf-

[2] The larger number at Plant 2 occurred primarily during the last few days of the strike (March 10-15), when a back-to-work movement had already set in (R. 1525-1526). Although most of the picketing at Plant 1 was done by employees of that plant, occasionally Plant 2 employees and CIO members from other plants in Gardner joined in. When just Plant 1 employees participated, the number of pickets varied from 29 to 60 (R. 2472, 2477).

ter, Union agents instructed the strikers to be orderly, to confine themselves to peaceful persuasion, to keep moving several feet apart and to molest nobody (R. 2452; 139-141, 184-185, 208, 229, 249, 282, 294, 307, 314, 332-333, 376, 422, 437, 451). Moreover, as soon as the picketing began, petitioners' president, Troendle, arranged for police to be present at the plant entrances, and they were on the premises throughout the period of the picketing. (R. 2469-2482.)

A fair picture as to how the picketing was conducted is afforded by the testimony of Police Chief Le Blanc concerning the activity at Plant 1 on the morning of February 17, 1949—a time when the picket line was unusually large (about 145 people) because of the participation of outside sympathizers (R. 1023). Chief Le Blanc observed a moving picket line extending the length of the Sanborn side of the plant and passing over both of the driveways;[3] the pickets were approximately a man's

[3] Plant 1, as it faces Sanborn Street, consists of three entrances: entrance A, which is an alleyway between the plant and a building owned by the Simplex Time Recorder Company, is used by employees who arrive on foot; entrance B, located 152 feet to the right or east, consists of an automobile driveway and is used by employees who drive to work in their automobiles; entrance C, about 34 feet further east, is another driveway used in the same fashion as B, but not as frequently (R. 2454-2456).

Strike activity at Plant 2 took place mainly on the Summer Street side where there is a plant parking area immediately adjacent to the street; separated from the street in most places by bushes or gullies, it is entered by either of two driveways which break through the shrubbery (R. 2457).

reach apart and appeared to be doubling back in an elongated circle (R. 1018-1019). As five or six cars then approached a driveway, "the police officers stepped between the pickets and made an alleyway * * * and the cars went through" (R. 1020). The pickets "came right behind the police officers * * * and stood there while the cars went by, and they didn't over-run the officers * * *" (R. 1025). Although "there was cat calls, and scabs, and things of that kind," there was no "deep profane language" (R. 1021, 1022). See also R. 1035, 1041-1042, 1043, 1046-1047, 1053, 1089.[4]

Throughout the period of the picketing, supervisory officials and rank-and-file employees who desired to work were able to get into and leave the plants whenever they desired (R. 69, 1164, 1172, 1188, 1216-1217, 1219, 1237, 1600-1601, 1604, 2106, 2131, Tr. 7679). Moreover, at Plant 1, where the pickets were more numerous, 77 employees out of a total of 164 worked the first week of the strike (R. 2457), and as the strike prolonged, additional employees returned; while at Plant 2, although only a few of the 67 rank-and-file employees reported for work during the month of February, about 25 had returned by March 15, despite the fact that the picket line was largest during the second week in March (R. 1525-1526, 2810).

The pickets uniformly recognized the authority of the police and obeyed their instructions. As

[4] Provocative remarks also emanated from the plant, being uttered by non-strikers who were at work (R. 446-447, 531, 1074).

indicated above, the pickets would free the driveways as soon as the police stepped in, forming lines behind the officers (see also, R. 1032, 1033-1034, 1037-1038, 1046, 1047-1048, 1097-1098). This generally occurred even before the cars arrived at the driveway (R. 1021-1022, 1035, 1042, 1043, 1054, 1074-1075, 1953-1954). On some occasions the driveway was cleared by the pickets even before the police stepped in (R. 1077, Tr. 5898), and, from about the middle of February until March 15 when the picketing ended, the police were required to do nothing more than motion or blow a whistle when they desired to ensure a clear driveway (R. 1025, 1062, 1357). Insofar as the pedestrian entrances were concerned, "most of the time" the pickets would spread apart on their own volition (R. 1079, 2149, 2150, Tr. 5868-5869). In sum, Sergeant Hugo Uppgard, who was on duty at Plant 1 for most of the picketing, testified that he observed nonstriking employees going into and out of the plant every day; that he had not "observed a single incident where anyone was unable to get in the factory because of the picket line," and that, except for the action of the police in making an alley for the cars, there were no incidents on the picket line that "necessitated any police action at all" (R. 1078-1079). See also R. 1041-1042, 1071, 1932, 1933, 2136.[5]

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[5] Only one arrest resulted from the entire picketing (R. 1029-1030), the facts surrounding it being as follows: On March 8—during the sixth week of the strike and one week before it ended—Union agent Saul Silverman, after employee Ivan

C. *The individual acts of misconduct*

In addition to having engaged in the aforementioned picketing, about 42 of the 103 strikers who were denied reinstatement were alleged to have participated in individual incidents of misconduct, either on or away from the picket line. These incidents, many of which were unsubstantiated by the evidence, ranged from calling non-strikers such names as "scab" and "rat" to visits by carloads of strikers to the homes of non-strikers. The detailed findings with respect to each incident appear at R. 2489-2523.

D. *Petitioners' request for the prehearing statements of Board witnesses*

During the cross-examination of Edgar Arsenault early in the hearing before the Trial Examiner, petitioners' counsel demanded to see a written statement which the examination disclosed had been furnished by the witness to a Board agent in the course of the latter's preliminary investigation but which had not been used at the hearing (R. 2836-2837, 377-378). Trial counsel for the General Counsel, relying upon the Board's rule prohibiting disclosure of information in the Board's files save on authority of the Board, its Chairman, or the General Counsel (Pet. 32-33) and relying also upon

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Brodeur's car almost ran him down at Plant 2, followed Brodeur into the parking lot and kicked him. Silverman was arrested, charged with assault, and later paid a $15 fine (R. 2474). Since Silverman was an official of the Union, the Board also found that this incident was violative of Section 8 (b) (1) (A) of the Act (R. 2535).

petitioners' failure to lay a proper basis for its production, declined to produce the document (R. 378, 383-384, Trial Examiner's Exh. 1).

Petitioners' counsel thereupon applied to the General Counsel, by letter dated July 18, 1950, to grant authorization to trial counsel to produce Arsenault's statement together with "statements given to any representative of the NLRB by any witness who may testify during the course of said hearing" (R. 2850-2851). The sole basis recited in the letter to support the demand related only to Arsenault, *viz.*, that his statement was requested "for the purpose of demonstrating to the Trial Examiner that the evidence which he had given was contradictory to and inconsistent with said statement, which I had good reason to believe was a fact" (R. 2850).

The General Counsel rejected petitioners' demand by letter of July 20, 1950, emphasizing that his action was predicated upon the utter failure of petitioners to have established the proper foundation. Thus, the General Counsel's reply stated (R. 2853):

> * * * the opening up of the Government's file in the absence of at least a *prima facie* showing that the documents sought contain matter inconsistent with the testimony would simply lay the administrative process open to endless and pointless delay, and, in addition, would expose confidential data to needless disclosure, thereby seriously impairing the

capacity of the Government's agents in the future to obtain evidence in the course of their investigations.

Although the hearing lasted almost 5 months longer, petitioners took no steps whatever during this period to make the necessary showing suggested in the General Counsel's letter. However, more than 9 months after the close of the hearing and more than 4 months after the issuance of the intermediate report of the Trial Examiner, petitioners filed with the Board a Motion to Reopen Record and Adduce Additional Testimony on this question. This motion added nothing which would furnish the requisite foundation for obtaining the documents sought (R. 2824-2853).

II. The Board's Conclusions and Order

On the basis of the facts adduced before it concerning the conduct of the picketing, the Board concluded that there was "no basis for inferring that the pickets intended or sought to prevent employees from entering or leaving the plants." Accordingly, it held that, despite the large number of pickets, the picketing was within the area of concerted activity protected by Section 7 of the Act, and thus participation therein did not, by itself, justify a denial of reinstatement. (R. 2575-2577.) In arriving at this conclusion, the Board rejected petitioners' contention that, since the Massachusetts courts, in the prior injunction suit instituted by petitioners, had found that the picketing was non-peaceful

and coercive (R. 2744-2758, 2785-2802), this finding was binding on the Board and precluded it from making a *de novo* and contrary evaluation of the conduct. The Board pointed out, *inter alia,* that unless it were free to make its own appraisal, rights under the Act would turn on " 'whatever different standards the respective states may see fit to adopt' ", thereby nullifying Congress' intention to vest the Board with " 'exclusive primary jurisdiction over all phases of the administration of the Act' " (R. 2574).

Respecting the individual incidents of misconduct, the Board further concluded that they were "insufficient to justify the Respondent Companies' refusal to reinstate the individuals involved." The Board's conclusion was based upon its further finding that: "None of the individual incidents involved actual restraint, violence or coercion, or conduct which exceeded the animal exuberance and mutual harassment characteristic of such strike situations." (R. 2579.) The Board indicated, moreover, that this appraisal of each incident, contrary to that of the Trial Examiner (R. 2489-2490), had been "without regard to the length, motive, physical or psychological setting of the strike" (R. 2579, n. 37).

Finally, on the procedural question, the Board concluded that, in the circumstances of this case, petitioners were properly denied the right to examine the statements which the Board witnesses had given to Board representatives prior to the hearing, but which were not used in the hearing

itself. It accordingly, denied petitioners' motion to reopen the record for purposes of adducing such statements. (R. 2566.)

Accordingly, the Board entered an order, *inter alia,* remedying the violations of Sections 8 (a) (1), (2) and (3) described at the outset (pp. 3-4), and requiring that the 103 strikers refused reinstatement be reinstated with back pay (R. 2581-2585).

III. The Decision of the Court Below

The court below accepted all of the Board's findings and conclusions, except those involving eight of the individual incidents of misconduct (Pet. 35-37, 46-47, 51). As to these incidents, the court, in disagreement with the Board, concluded that they "were coercive in nature and calculated to instill fear of physical harm in the nonstriker victims, and are therefore not activities protected under § 7" (Pet. 47-48). As to these incidents the court remanded the case to the Board for a determination "whether under the circumstances there was cause for respondents' refusal to rehire the particular strikers involved in the non-Section 7 activity, and if not whether reinstatement of these employees would effectuate the policies of the Act" (Pet. 47).

The court explained the reason for this remand as follows (Pet. 39-41):

> If an economic strike as conducted is not concerted activity within the protection of § 7, then the employer is free to discharge the participating employees for the strike activity and

the Board is powerless to order their reinstatement. . . . This is so because, if the particular collective action is not a protected § 7 activity, the employer commits no unfair labor practice by thus terminating the employment relation. He has not interfered with, restrained or coerced employees in the exercise of their rights guaranteed in § 7. . . . Therefore, since the power of the Board to order reinstatement under § 10(c) is dependent upon its finding that an unfair labor practice has been committed, and since by hypothesis the economic strike was not caused by an unfair labor practice, it becomes crucial to the question of reinstatement of an economic striker to inquire whether the strike as conducted constituted concerted activity within the protection of § 7.

On the other hand where, as in the instant case, the strike was caused by an unfair labor practice, the power of the Board to order reinstatement is not necessarily dependent upon a determination that the strike activity was a "concerted activity" within the protection of § 7. Even if it was not, the National Labor Relations Board has power under § 10(c) to order reinstatement if the discharges were not "for cause" and if such an order would effectuate the policies of the Act. Of course the discharge of strikers engaged in non-Section 7 activities often may be for cause, or their re-

> instatement may not effectuate the policies of the Act, but in certain circumstances it may. The point is that where collective action is precipitated by an unfair labor practice, a finding that the action is not protected under § 7 does not, *ipso facto,* preclude an order reinstating employees who have been discharged because of their participation in the unprotected activity [footnotes omitted].

Accordingly, the court enforced the Board's order in full, except for those provisions directing reinstatement with back pay for the strikers involved in the eight incidents of misconduct, and as to these the case was remanded to the Board for further proceedings.

ARGUMENT

1. The remand to the Board for consideration of the eight incidents of strike misconduct which the court below found constituted restraint and coercion of non-striking employees (Pet. 47-48) presents no question warranting review by this Court at this stage of the litigation. Adhering to the mandate of the court below, which requires that such misconduct be evaluated against the general background of the dispute and the employer's unfair labor practices, the Board might conclude that the conduct afforded sufficient cause for discharge and that reinstatement of the participants therein would not effectuate the policies of the Act. Such a conclusion would moot the question raised by pe-

titioners. And, should the Board reach a contrary conclusion, its decision, after review in the court below (see Pet. 45, n. 14), could then be brought before this Court.

Nor is there any justification for obtaining immediate review by this Court on the ground that the possible action which might be taken by the Board on remand would be beyond its powers and incompatible with past decisions. Assuming *arguendo* that such a contention, though clearly premature at this time, may nevertheless be raised by petitioners, it is plainly without merit. In determining whether misconduct occurring in the course of a lawful strike would deprive the participants of their reinstatement rights, the Board and the Courts of Appeals, both under the original and amended Acts, have generally distinguished between activities which "exceed the bounds of lawful conduct in 'a moment of animal exuberance' (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 . . .) or in a manner not activated by improper motives, and those flagrant cases in which the misconduct is so violent or of such serious character as to render the employee unfit for further service." *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 815-816 (C.A. 7).[6] Moreover, since extenuating

[6] See also, *National Labor Relations Board* v. *Kelco Corp.*, 178 F. 2d 578, 582 (C.A. 4); *National Labor Relations Board* v. *Cambria Clay Products Co.*, 34 LRRM 2471, 2475-2476 (C.A. 6, July 7, 1954); *Dalton Telephone Co.*, 82 NLRB 1001, 1006, enforced, 187 F. 2d 811 (C.A. 5), certiorari denied, 342

circumstances may mitigate the effect of misconduct considered in the abstract, the fact that there are also unfair labor practices on the part of the employer may properly be taken into account in making this appraisal.[7] Indeed, this Court, in differentiating between the unprotected work stoppage in *Automobile Workers* v. *Wisconsin Board*, 336 U.S. 245, and the stoppages in *Harnischfeger Corp.*, 9 NLRB 676, and related cases which did not justify discharge, explained that in the latter, "The drastic remedy of discharge, so outweighing any possible damage in those cases to the employer and so tainted by antiunion motives, led to the Board's conclusion of unfair labor practices proscribed by the Act." *Automobile Workers, supra*, 336 U.S. at p. 256.

The decisive inquiry has sometimes been expressed in terms of whether the conduct exceeds or is within the bounds of the concerted activity pro-

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U. S. 824; *Deena Artware Co.*, 86 NLRB 732, 734, enforced, 198 F. 2d 645 (C.A. 6), certiorari denied, 345 U. S. 906; *Kansas Milling Co.*, 86 NLRB 925, 927-928, enforced on this point, 185 F. 2d 413 (C.A. 10); *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. 2d 472, 479 (C.A. 3), certiorari denied on this point, 309 U. S. 684; *National Labor Relations Board* v. *Elkland Leather Co.*, 114 F. 2d 221, 225 (C.A. 3), certiorari denied, 311 U. S. 705.

[7] Cf. *Berkshire Knitting Mills*, 46 NLRB 955, 1003, enforced, 139 F. 2d 134, 141 (C.A. 3), certiorari denied, 322 U. S. 747, with *Republic Creosoting Co.*, 19 NLRB 267, 288; *Acme-Evans Co.*, 24 NLRB 71, 118, enforced, 130 F. 2d 477 (C.A. 7), certiorari denied, 318 U. S. 772; NLRB, *Third Annual Report* (Gov't. Print. Off., 1939), 209-212; NLRB, *Fourth Annual Report* (Gov't. Print. Off., 1940), 105-107. See also, *Mastro Plastics Corp.*, 103 NLRB 511, 515, enforced, 34 LRRM 2484 (C.A. 2, July 16, 1954).

tected by Section 7,[8] and sometimes merely in terms of whether reinstatement would effectuate the policies of the Act.[9] However stated, it is clear that a striker's right to reinstatement under the Act is not automatically lost because he has engaged in violence or intimidation. The question is whether, in the light of all the circumstances, the misconduct is sufficiently serious to render the employee unfit for further employment.[10] Reaching the same result, the court below stated that strike activities which restrain or coerce other employees are outside the protection of Section 7, and that the surrounding circumstances, including the employer's provocation, are to be taken into account "in deciding whether or not [the strikers'] discharge was 'for cause' and whether their reinstatement would effectuate the policies of the Act" (Pet. 47).

There is no merit in petitioners' contention (Pet. 12, 14-15) that the decisions of this Court in *National Labor Relations Board* v. *Fansteel Corp.*, 306 U.S. 240, and *Southern S. S. Co.* v. *National*

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[8] See *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 815-816 (C.A. 7); *Elk Lumber Co.*, 91 NLRB 333, 336-337; *Nashville Corp.*, 94 NLRB 1567, 1570; *Porto Rico Container Corp.*, 89 NLRB 1570, 1578; *Longview Furniture Co.*, 100 NLRB 301, 304-305, modified, 206 F. 2d 274 (C.A. 4); *National Electric Products Corp.*, 80 NLRB 995, 999-1000.

[9] See cases in n. 6, *supra*.

[10] To the extent that the Board used a narrower approach in this case (see p. 11), it was attributable to the circumstance that, in its view, this was sufficient to meet petitioners' contention, which was merely that the incidents of misconduct were a bar to reinstatement because non-strikers were restrained and coerced thereby (see R. 2579).

Labor Relations Board, 316 U.S. 31, preclude giving consideration to the employer's unfair labor practices in determining whether employees engaging in strike misconduct have forfeited their right to reinstatement. *Fansteel* involved a sit-down strike and *Southern Steamship* a mutiny on board ship. Both of these activities, unlike the type of misconduct involved in the incidents for which this case was remanded by the court below, made the strike unlawful in its very inception. The Court's opinions make clear that it was this particular circumstance, not the irrelevance of employer unfair labor practices generally, that led to the conclusion in those cases that reinstatement was not warranted notwithstanding the employer provocation. Thus, the majority opinion in *Southern Steamship* states (316 U.S. at 48): "We cannot ignore the fact that the strike was unlawful from its very inception. * * * *Consequently,* and despite the initial unfair labor practice which caused the strike, we hold that the reinstatement provisions of the order exceeded the Board's authority to make such requirements 'as will effectuate the policies of the Act' " (emphasis added).[11] And, in *Fansteel,* after finding that the sit-down made the strike unlawful in its inception (306 U.S. at 256), the Court went on to state (*id.*

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[11] Similarly, the dissenting opinion described the majority decision as holding that "where *the strike provoked* by the unfair practices *is itself unlawful,* the Board, regardless of the circumstances, loses its power to reinstate after discharge" (316 U. S. at 50, emphasis added). See also the majority opinion, *id.*, at 38.

258): "We are of the opinion that to provide for the reinstatement or reemployment of employees guilty of the acts which the Board finds to have been committed *in this instance* would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure. * * * whatever discretion may be deemed to be committed to the Board, its limits were transcended *by the order under review*" (emphasis added).

In short, *Fansteel* and *Southern Steamship* merely hold that a sit-down or mutiny in the circumstances there presented was such flagrant misconduct that the employer provocation could not justify reinstatement of the employees involved. Cf. *Mackay Radio & Telegraph Co.*, 96 NLRB 740, 742-743. These cases do not foreclose the possibility that employer unfair labor practices may, for purposes of reinstatement, extenuate the action of employees who, in the course of a lawful strike and in their zeal to enlist the aid of nonstrikers, overstep in some instances the bounds of peaceful persuasion, where the Board justifiably finds that such reinstatement would effectuate the policies of the Act.

Equally insubstantial is petitioners' contention (Pet. 14) that the remand is erroneous because the House Conference Report makes clear that, under the amended Act, employees who engage in conduct which falls outside the protection of Section 7 would automatically forfeit their reinstatement

rights. Assuming that certain parts of the statement section of the Conference Report, which only the House conferees signed,[12] are in isolation susceptible of such interpretation,[13] a comprehensive study of the Act fails to support it.[14] Thus, the fact that the statute as enacted specifically provides for automatic loss of employee status only in the case of employees who strike during the 60-day waiting period imposed by Section 8(d), tends to refute an extension of this drastic result to other types of misconduct. Moreover, automatic forfeiture leaves no room for employer condonation of misconduct, a principle which was retained under the amended Act.[15] And, as the court below correctly noted (Pet. 39-41), the structure of Section 10(c) is such that, in the case of a strike caused by an unfair labor practice, unlike the economic strike cases cited in the House Conference Report, the power of the Board to order reinstatement is not necessarily

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[12] H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 69, in 1 Legislative History of the Labor Management Relations Act, 1947 (Gov't. Print. Off., 1948) 573.

[13] *Id.*, at 38-39, in 1 Leg. Hist. 542-543.

[14] It "is a statute and not a committee report which we are interpreting." *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 489.

[15] See *Stewart Die Casting Corp.* v. *National Labor Relations Board*, 114 F. 2d 849, 855 (C.A. 7), certiorari denied, 312 U. S. 680; *National Labor Relations Board* v. *Alabama Marble Co.*, 185 F. 2d 1022 (C.A. 5), enforcing 83 NLRB 1047; *National Labor Relations Board* v. *E. A. Laboratories*, 188 F. 2d 885 (C.A. 2), certiorari denied, 342 U. S. 871.

dependent upon a determination that the strike activity was protected by Section 7.[16]

This analysis does not overlook the proviso added to Section 10(c) by the amendments, precluding reinstatement of employees "discharged for cause." The legislative history of this provision indicates that it was merely intended to leave no doubt as to the right of an employer to discharge for reasons wholly unrelated to union or concerted activities, but that it did not change "the existing provision of law" which left it to the Board, on the facts of each case, to determine whether there was "cause."[17] As the court below stated (Pet. 40), "What is *cause* in one situation may not be in another." Since, with respect to strike misconduct, the determination of whether it constituted cause for discharge formerly comprehended evaluation by the Board in the light of all the circumstances, including the employer's own unfair labor practices, it follows that the proviso to Section 10(c)

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[16] Contrary to petitioners' suggestion (Pet. 13), this "subtlety" has been recognized by the Board, indeed, in the *American News* case, 55 NLRB 1302, 1307, which the House Conference Report endorsed. In view of the Board's prior finding that the conduct involved in the remanded incidents was within the scope of Section 7, it was, of course, unnecessary for it to reach the further question of whether reinstatement would nevertheless be proper even if the conduct fell outside the scope of Section 7.

[17] 93 Cong. Rec. 6518, in 2 Leg. Hist. 1593-1594; *National Labor Relations Board* v. *Dixie Shirt Co.*, 176 F. 2d 969, 974 (C.A. 4). Cf. *National Labor Relations Board* v. *Local Union No. 1229*, 346 U. S. 464, 475-479.

has not diminished reinstatement rights in the situation presented here.

2. As to the conduct of the picketing and the other incidents of alleged strike misconduct, the court below accepted the Board's findings that these activities did not restrain and coerce non-strikers, and thus were within the protection of Section 7 (Pet. 46-47, 35, 37). The court thus necessarily held that the findings of the Massachusetts courts that this activity was violent and coercive, for purposes of state law, did not preclude the Board from evaluating it differently and thus were not determinative of whether the conduct was protected by Section 7.[18] This holding is clearly correct and in accord with settled authority.

Although the Board has accepted the findings of a state court that acts of violence or coercion were committed "as some evidence" on this question (Pet. 20),[19] it has never treated these findings as

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[18] Without substance is petitioners' contention (Pet. 12-13, 16, 18) that the court below avoided deciding whether the state findings would be determinative on the Section 7 issue because of its view that, even if the conduct were unprotected, the Board nevertheless could order reinstatement therefor. This is apparently based on that portion of the court's opinion which discusses the general considerations for and against giving binding effect to the state court findings (Pet. 42-43), and overlooks the fact that the court below concluded that discussion by rejecting petitioners' contention (Pet. 43), and then went on specifically to accept the Board's contrary finding that the activity was protected by Section 7 (Pet. 46-47).

[19] So, in this case, the Trial Examiner admitted in evidence copies of the state court pleadings, the findings and injunctions issued by the trial court, and the decision of the Massachusetts Supreme Court (R. 141-152, 180-181, 2334-2335, 2724-2802). Moreover, he permitted the transcript of the testimony in

precluding it from making an independent evaluation as to whether the conduct found is serious enough to cause a forfeiture of reinstatement rights under the Act, or, indeed, from gathering its own evidence as to what occurred.[20] Moreover, contrary to petitioners' assertion, this procedure has received uniform judicial approval, even under the amended Act.[21] Unless the Board were permitted this independence, the effect would be—contrary to Congress' intention to establish a uniform national labor policy administered by the Board—"to introduce variations into the statute's operation as wide as the differences the forty-eight states and other local jurisdictions" may see fit to make. *National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 111, 123. And, in addition, important policies of the Act could well be frustrated.

These considerations are particularly compelling here. Thus, the evidence adduced in the Board proceeding showed, *inter alia,* that the pickets did not bar ingress or egress, and that they obeyed the police who were able to maintain order (pp. 5-7, *supra*). The state trial court found differently, but on the basis of evidence whose sufficiency, due to a technicality of state procedure, could not be reviewed by the Massachusetts Supreme Judicial Court (R. 2798-2799). Furthermore, implicit in the

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the state court proceeding to be used for impeachment purposes (R. 1076-1081).

[20] See *Nashville Corp.,* 94 NLRB 1567.

[21] See cases in n. 6, *supra.*

state finding that the manner of the picketing was illegal is the Massachusetts rule which permits a finding of coercion based upon numbers alone. See *New England Novelty Co.* v. *Sandberg,* 315 Mass. 739, 54 N.E. 2d 915, 921, certiorari denied, 323 U.S. 740. As we shall show (pp. 25-26), the Act rejects this principle.

A more conclusive effect for the state court findings here is not required by this Court's holdings—in *Allen Bradley Local* v. *Wisconsin Emp. Relations Board,* 315 U. S. 740, *Garner* v. *Teamsters Union,* 346 U. S. 485, and *United Construction Workers* v. *Laburnum Corp.,* 347 U. S. 656 (Pet. 16-17)—that the Act leaves state courts with jurisdiction to regulate mass picketing and strike violence. Granted that these courts have a jurisdiction in this sphere, it is at best a concurrent, not an exclusive, jurisdiction. They are free to determine whether such conduct amounts to a breach of the peace, for purposes of their own civil and criminal proceedings. The Board, in turn, is equally free, for purposes of determining reinstatement rights under the Act, to make its own appraisal of the conduct. In recognition of this distinction, the Court specifically emphasized in *Allen Bradley,* 315 U. S. at 751: "If the order of the state Board affected the status of the employees, or if it caused a forfeiture of collective bargaining rights, a distinctly different question would arise." See also, *Hill* v. *Florida,* 325 U. S. 538.[22]

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[22] That the Board may find the conduct was peaceful, whereas the state court, on the basis of the different record and principles before it, may reach a contrary conclusion, is

3. Petitioners' further contention (Pet. 20-22) that the facts, even as found by the Board did not warrant the conclusion that the picketing was protected by Section 7, rests on the erroneous premise that the Act makes the mere size of the picket line determinative of its propriety. Although Section 12(a) of the House Bill [23] would have interdicted "picketing . . . in numbers . . . otherwise than is reasonably required to give notice of the existence of a labor dispute at such place of business," this provision was not enacted. Of the amendments to the Act ultimately adopted, Section 8(b)(1)(A) was the only one which purported to encompass conduct characterized by the popular term "mass picketing"; that section does not define "mass picketing," but simply says that labor organizations shall not "restrain" or "coerce" employees. Accordingly, the Board has properly concluded, and in this conclusion the court below concurred, that, for purposes of the Act, picketing in substantial numbers is not precluded, unless the manner of its conduct would tend to bar non-striking employees and others from entering or leaving the plant.[24] This view is consistent with the de-

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no more "embarrassing" (Pet. 18) than what occurs whenever two tribunals exercise a concurrent jurisdiction over the same subject. See *United Brick & Clay Workers* v. *Deena Artware, Inc.*, 198 F. 2d 637, 642 (C.A. 6), certiorari denied, 344 U. S. 897; *International Longshoremen's and Warehousemen's Union* v. *Juneau Spruce Corp.*, 342 U. S. 237.

[23] H. R. 3020, 80th Cong., 1st Sess., in 1 Leg. Hist. 204-205.

[24] See *Cory Corp.*, 84 NLRB 972, 976-977; *Irwin-Lyons Lumber Co.*, 87 NLRB 54, 76, 81. Implicit in this holding is the recognized fact that large numbers of pickets may have

cision in *National Labor Relations Board* v. *Indiana Desk Co.*, 149 F. 2d 987, 995 (C. A. 7), cited in the House Conference Report (Pet. 21), which turned, not on the mere size of the picket line, but on the fact that the picketing both had the avowed purpose and effect of barring access to the plant.

In this light, petitioners' contention that the picketing was not protected by Section 7 reduces itself to a challenge to the substantiality of the evidence supporting the Board's finding that the picketing as conducted did not bar ingress or egress to the plant. Such issue does not warrant review by this Court. *General Talking Pictures* v. *Western Electric*, 304 U. S. 175, 178; *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 503. In any event, it is clear that the record furnishes adequate support for the Board's findings (R. 2575-2576, 2469-2484; Pet. 37, 46-47).

4. Finally, no question warranting review is presented by petitioners' contention (Pet. 22-27) that they were entitled, upon demand, to examine all statements which Board witnesses had given to Board employees in the investigative stage of the case, but which were not used at the hearing.[25] As

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a wholly legitimate object apart from restraint or coercion of non-strikers, such as maintaining the discipline and morale of the strikers. See Brooks, Robert R. R., *When Labor Organizes* (Yale, 1938), 106-107; *Restatement of Torts*, § 779, Comment f.

[25] With respect to those of the pre-trial documents which Board counsel had occasion to use in the course of the hearing, they were in every instance offered to petitioners' counsel for inspection (see R. 2564; Pet. 50, n. 23).

the court below properly noted, no such absolute right was conferred by state law, the "leading Massachusetts decision on the subject, *Leonard* v. *Taylor*, 315 Mass 580, 53 N. E. 2d 705 (1944), we read as directly contrary to such proposition" (Pet. 51). Moreover, the court's conclusion that the denial of petitioners' request was warranted in the light of the circumstance that they had made no *prima facie* showing that the statements contained relevant contradicting material (Pet. 51), is consistent with the decisions of the other Courts of Appeals which have considered this problem in Board cases,[26] and with the decisions of this Court dealing with analogous questions.[27]

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[26] *National Labor Relations Board* v. *Quest-Shon Mark Brassiere Co., Inc.*, 185 F. 2d 285, 289 (C.A. 2); *National Labor Relations Board* v. *Jamestown Sterling Corp.*, 211 F. 2d 725 (C.A. 2); *National Labor Relations Board* v. *T. W. Phillips Gas & Oil Co.*, 141 F. 2d 304, 306 (C.A. 3).

[27] See *Goldman* v. *United States*, 316 U. S. 129, 132; *Gordon* v. *United States*, 344 U. S. 414, 420. See also, *Lennon* v. *United States*, 20 F. 2d 490, 493-494 (C.A. 8); *Arnstein* v. *United States*, 296 Fed. 946, 950 (C.A. D.C.), certiorari denied, 264 U. S. 595.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question warranting review. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1954.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

FINDINGS AND POLICIES

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent

business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these ob-

structions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. * * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; * * *

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating

a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed

period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial

statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair

labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

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